Supreme Court, U. S.
FILED
JUN 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

## No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR,
KENNETH A. STEVENS, AND
CYNTHIA KOONCE MILLER,

*Appellants,*

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

*Appellees.*

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

## BRIEF FOR SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.

GEORGE T. TYLER,
ROBERT V. BARTON, JR.,
1600 Maryland Nat'l Bank Bldg.,
Baltimore, Maryland 21202,
Attorneys for Appellee,
Saint Joseph College.

The Daily Record Co., Baltimore, Md. 21202

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 3 |
| STATUTES INVOLVED | 3 |
| QUESTIONS PRESENTED | 3 |
| STATEMENT OF THE CASE | 4 |
| SUMMARY OF ARGUMENT | 9 |
| ARGUMENT | 13 |
| I. This Court has upheld public aid to church-related colleges where the colleges were not pervasively sectarian and where the aid was restricted from use for religious activities | 13 |
| A. This Court has consistantly examined the particular functions of church-related institutions to determine whether public aid to that function violates the Establishment Clause | 14 |
| B. While this Court has required public aid involving pervasively sectarian institutions to be specifically categorized and narrowly prescribed, it has required aid to institutions with secular educational programs to be limited only by negative restrictions preventing use for religious purposes | 21 |

PAGE

II. The Maryland aid program does not have the primary effect of advancing religion ..... 23

A. The Maryland aid to St. Joseph College does not advance religion because the college is not pervasively sectarian ..... 23

B. The Maryland Act prohibits aid for sectarian purposes and the State has established procedures to enforce the restrictions ..... 33

III. The Maryland program does not foster excessive governmental or political entanglement with religion ..... 41

A. Maryland aid to the educational functions of St. Joseph College may be administered without government entanglement because religion does not pervade those educational functions ..... 41

B. The Maryland system requiring use identification and verification is a proven means of restricting governmental grants for designated purposes without requiring intensive surveillance ..... 44

IV. If the Maryland aid program is in violation of the Establishment Clause, St. Joseph College should not be required to pay back funds already received in reliance upon the constitutionality of the Maryland Act ..... 47

CONCLUSION ..... 50



## TABLE OF CITATIONS

### *Cases*

PAGE

American Civil Liberties Union v. Board of Public Works, 357 F. Supp. 877 (D. Md. 1972) ..... 2

Board of Education v. Allen, 392 U.S. 236 (1968) ..... 22

Bradfield v. Roberts, 175 U.S. 291 (1899) .....15, 16, 17

Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) .....13, 14, 20

Everson v. Board of Education, 330 U.S. 1 (1947) ..... 22

Hunt v. McNair, 413 U.S. 734 (1973) ..... 13, 14, 19, 20, 22, 23, 35, 36, 43

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... 13, 14, 17, 19, 20, 41, 42, 43, 46

Lemon v. Kurtzman, 411 U.S. 192 (1973) ...12, 47, 48, 49

Levitt v. Committee for Public Education & Religious Liberty, 413 U.S. 472 (1973) ..... 13, 20

Meek v. Pittenger, 43 U.S.L.W. 4596 (No. 73-1765, May 19, 1975) .....13, 20, 21, 22, 40, 45, 46, 49

Roemer v. Board of Public Works of the State of Maryland, 387 F. Supp. 1282 (D. Md. 1974) ..... 2

Sloan v. Lemon, 413 U.S. 825 (1973) .....13, 20, 45

Tilton v. Finch, 312 F. Supp. 1191 (D. Conn. 1970) .....11, 38, 40, 41, 44

Tilton v. Richardson, 403 U.S. 672 (1971) ..... 6, 10, 11, 13, 14, 19, 20, 22, 23, 28, 35, 36, 37, 43, 45, 49

Walz v. Tax Commission, 397 U.S. 664 (1970) 17, 18, 19

***Statutes***


United States Statutes: PAGE

Act of June 25, 1948, c. 646, 62 Stat. 930, as amended by Act of July 25, 1958, 72 Stat. 415 (28 U.S.C. §1331) ..... 2

Act of June 25, 1948, c. 646, 62 Stat. 930, (28 U.S.C. §2281) ..... 2

Act of June 25, 1948, c. 646, 62 Stat. 968, as amended by Act of June 11, 1960, 74 Stat. 201 (28 U.S.C. §2284) ..... 2

Act of June 25, 1948, c. 646, 62 Stat. 928 (28 U.S.C. §1253) ..... 2

Act of December 16, 1963, 77 Stat. 365, as amended (The Higher Education Facilities Act of 1963, 20 U.S.C. §§711-721, 1964 ed. and Supp. V), repealed June 23, 1972, 86 Stat. 303 ..... 35

Act of December 16, 1963, 77 Stat. 374, as amended (The Higher Education Facilities Act of 1963, 20 U.S.C. §751, 1964 ed. and Supp. V) ..... 35

Maryland Statutes:

Chapter 626, Acts of 1971 ("Aid to Non-Public Institutions of Higher Education") as amended by Chapters 483 and 534, Acts of 1972; Chapter 716, Acts of 1973; and Chapter 585, Acts of 1974; codified in Article 77A, §§65-69, Annotated Code of Maryland volume 7A (1975 Replacement Volume):

Chapter 626, Acts of 1971 ..... 3, 4, 5

Chapter 483, Acts of 1972 ..... 3

Chapter 534, Acts of 1972 ..... 3, 5, 34

Chapter 716, Acts of 1973 ..... 3, 5


IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

## No. 74-730

JOHN C. ROEMER, III, EDWARD E. DOERR, KENNETH A. STEVENS, AND CYNTHIA KOONCE MILLER,

*Appellants,*

v.

BOARD OF PUBLIC WORKS OF THE STATE OF MARYLAND; MARVIN MANDEL, GOVERNOR; LOUIS L. GOLDSTEIN, COMPTROLLER; JOHN A. LUETKEMEYER, TREASURER; COLLEGE OF NOTRE DAME OF MARYLAND, INC.; MOUNT SAINT MARY'S COLLEGE; SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.; AND THE ASSOCIATED PROFESSORS OF LOYOLA COLLEGE OF THE CITY OF BALTIMORE, INC.,

*Appellees.*

ON APPEAL FROM A UNITED STATES DISTRICT COURT OF THREE JUDGES FOR THE DISTRICT OF MARYLAND

## BRIEF FOR SAINT JOSEPH COLLEGE AT EMMITSBURG, MARYLAND, INC.

### OPINIONS BELOW

The opinion of the District Court of three judges, Bryan J., dissenting, was issued October 16, 1974. It is set forth in the Appendix of Appellants' Jurisdictional

Statement.[1] Findings of fact were filed November 30, 1973; amended findings of fact were filed January 18, 1973 and were included by the court below as an appendix to its opinion (App. to Jur. St. 35). The opinion and findings are reported in *Roemer v. Board of Public Works of the State of Maryland,* 387 F. Supp. 1282 (D. Md. 1974). The preliminary rulings of the District Court dismissing the claims of the organizational Plaintiffs for lack of standing, and dismissing the complaint based upon the Free Exercise Clause are reported at *American Civil Liberties Union of Maryland v. Board of Public Works of the State of Maryland,* 357 F. Supp. 877 (D. Md. 1972).

## JURISDICTION

Jurisdiction of the court below is grounded upon Title 28, United States Code, Section 1331. A District Court of Three judges was convened pursuant to Title 28, United States Code, Section 2281 and 2284.

Judgment against appellants was entered on October 21, 1974 in the United States District Court for the District of Maryland and notice of appeal was filed in that court by Appellants on October 25, 1974.

The jurisdiction of this Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. Probable jurisdiction was noted by this Court on Feburary 18, 1975.

---

[1] References to the Record and Appendices are cited as follows:

"App. to Jur. St." — Appendix to Jurisdictional Statement.
"App." — Single Appendix.
"Tr." — Trial Transcript.
"R" — Record.
"PX" — Plaintiffs' Exhibit.
"JX" — St. Joseph College Exhibit.



## CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTES INVOLVED

The Maryland law involved is Chapter 626, Acts of 1971 (entitled "Aid to Non-Public Institutions of Higher Education"); as amended by Chapters 483 and 534, Acts of 1972 and Chapter 716, Acts of 1973. The statute, as amended, is codified in Article 77A, §§65-69, Annotated Code of Maryland (1975 Replacement Volume) (App. to Jur. St. 52-56).

## QUESTIONS PRESENTED

I. Does the Maryland aid program have a primary effect of advancing religion and therefore violate the Establishment Clause?

II. Does the Maryland aid program cause excessive governmental entanglement with religion and therefore violate the Establishment Clause?

III. If the Maryland aid program is held to violate the Establishment Clause, should the Appellee colleges be required to pay back funds paid to them by the State?

## STATEMENT OF THE CASE

This suit was brought on March 27, 1972 by the American Civil Liberties Union of Maryland, Protestants and Other Americans United for Separation of Church and State and the Appellants, four Maryland citizens and taxpayers. Plaintiffs' complaint (App. 6) alleged that the Maryland statute violated the Establishment Clause and the Free Exercise Clause of the First Amendment. Plaintiffs prayed that the statute be declared unconstitutional on its face and as applied; that the Appellee, Board of Public Works of Maryland (defendant below) be enjoined from paying aid to the Appellee colleges (defendants below); that the Appellee colleges be required to return the funds received with interest earned; and that judgment for costs in favor of Appellants be entered (App. 10).

Defendants to the suit include Appellees herein: the Board of Public Works of the State of Maryland and its three individual members; and four private church-related colleges.

The Maryland statute was enacted in 1971 and amended in 1972 and 1973. Chapter 626, Acts of 1971, effective July 1, 1971 authorized the Board of Public Works to award to private institutions of higher education meeting the criteria set forth, two hundred dollars for each associated degree granted and five hundred dollars for each bachelor's degree granted by the college. The Act provided that the college could not be an institution awarding only seminarian or theological degrees. The Act contained no restrictions as to the use of the funds granted.



The 1971 Act was amended by Chapter 534, Acts of 1972, effective July 1, 1972. The Act imposed the restriction that no funds received by the institution could be used for sectarian purposes.

The Act was further amended in 1973 by Chapter 716, Acts of 1973, effective July 1, 1973. The Act provided for awards of five hundred dollars for advanced degrees, provided that sufficient funds were appropriated in excess of sums necessary for awards for undergraduate degrees. The restrictions as to use were effective as to the graduate awards.

The court below dismissed the organizational Plaintiffs for lack of standing (App. to Jur. St. 2, n. 1), and dismissed the challenge based upon the Free Exercise Clause (App. to Jur. St. 3, n. 2).

On the merits the court below held that the original version of the statute, Chapter 626, Acts of 1971, violated the Establishment Clause because it contained no restrictions prohibiting the sectarian use of the funds (App. to Jur. St. 23). The court below denied Appellants' prayer that funds distributed under the Act be returned to the State because: (1) Suit was filed nine months after enactment of the statute and five months after payments were made; (2) The Appellees spent the funds in reliance upon the constitutionality of the Act; (3) Both *Lemon* and *Tilton* were decided after expenditure of the funds; (4) The defects in the Act were corrected in 1972 and the constitutional values to be protected by the Establishment Clause would not be furthered by a refund (App. to Jur. St. 24-25).

The court below held that the statute, as amended, was constitutional and denied Appellants' prayers for relief. The Judgment was filed October 21, 1974 (App. to Jur. St. 57-58).

The court below found the four Appellee colleges conformed closely to the defendant colleges in *Tilton v. Richardson*, 403 U.S. 672, 686 (1971) (App. to Jur. St. 10-11), and that the Appellee colleges are not so pervasively sectarian that the aid would have the primary effect of advancing religion (App. to Jur. St. 11). The court based this conclusion on the following findings:

1. St. Joseph College is "characterized by an atmosphere of academic freedom rather than religious indoctrination" (App. to Jur. St. 42).

2. Courses at St. Joseph College are taught "according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards" (App. to Jur. St. 40).

3. St. Joseph College "subscribes to the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors, and . . . obviously abides by it" (App. to Jur. St. 39). The teachers are subject to "no religious pressures, by anyone, on their classroom presentation or their selection of texts and course materials" (App. to Jur. St. 38).

4. At St. Joseph College there are no "quotas for membership on the governing board based on religion or membership in a religious order" (App. to Jur. St. 43). The College does not "receive aid from or make reports to an institutional church" (App. to Jur. St. 43).

5. At St. Joseph College "the great majority of students . . . are Catholic" (App. to Jur. St. 44), but "student bodies are chosen without regard to religion" (App. to Jur. St. 44).

6. At St. Joseph College "the main criteria for hiring is academic quality" and "hiring decisions are effectively low-level and participatory" (App. to Jur. St. 41).



7. St. Joseph College does not "require attendance at any religious exercise" (App. to Jur. St. 44).

8. Although St. Joseph College is "interested in encouraging spiritual interest," this encouragement does not "go beyond providing the opportunities or occasions for religious experience" (App. to Jur. St. 45), and "no aspect of the student conduct code . . . has any religious content" (App. to Jur. St. 44).

9. Although some classes at St. Joseph College begin with a prayer, "those classes which do start with prayer often do not utilize what would be called a traditional form of prayer, and students join in or not at their option" (App. to Jur. St. 39). "[T]here is no actual college policy encouraging prayer in class. It is treated as a facet of the instructor's academic freedom" (App. to Jur. St. 39). The Court below found that "a Maryland education department group which monitered the teachers education program at the College saw no evidence of religion entering into any elements of that program" (App. to Jur. St. 40).

10. St. Joseph College does "not offer majors in religion or theology" (App. to Jur. St. 45), but "certain of these courses are required" (App. to Jur. St. 46), The court below found "no indication that religious indoctrination was a goal of [St. Joseph College]" (App. to Jur. St. 13), but that religious courses "afford a congenial means of furthering the secondary objective of fostering religious experience" (App. to Jur. St. 46).

11. Although the court below found that a secondary objective of each Appellee college is to "encourage spiritual development of the students, . . ." (App. to Jur. St. 45), this finding was specifically limited. The court found, "at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience" (App. to Jur. St. 45).

The court below found that the administering body (The Maryland Council of Higher Education) had established procedures sufficient to safeguard the funds against use for sectarian purposes. The Council requires verification by the college, before and after use of the funds, that diversion of the funds for religious purposes will not occur (App. to Jur. St. 12). The colleges' verification of usage can be audited, if necessary, to confirm that the verified use in fact occurred (App. to Jur. St. 12).

The court below found that the use verification did not cause excessive entanglement of government with religion (App. to Jur. St. 17), citing the nature of the fund accounting which is used by Appellee colleges to comply with federal grants (App. to Jur. St. 48).

The court found that the administering body should exclude aid for the theology and religion departments of the Appellee colleges to avoid the possibility of misuse of the aid (App. to Jur. St. 12-13). The court found "no indication that religious indoctrination was a goal of these schools" (App. to Jur. St. 13), but that the funds should be so restricted absent "a clear indication that theology was taught as an academic discipline" (App. to Jur. St. 13).

At the time of trial, no funds had been disbursed under the 1972 amendment which prohibited use of funds for sectarian purposes. The funds were held in escrow (App. to Jur. St. 37, n. 2). Following the entry of judgment, Appellants moved for an injunction against payment of the escrowed funds pending this appeal. The motion was denied by the three-judge court below. Thereafter, application for injunction pending appeal was submitted to this Court and denied on November 25, 1974.



The Appellants' Jurisdictional Statement was filed December 11, 1974. This Court noted probable jurisdiction on February 18, 1975.

The Appeal as to Western Maryland College was dismissed on April 7, 1975 by motion under Rule 60 of this Court.

## SUMMARY OF ARGUMENT

I.

This Court has established a three-part test to determine if public aid to church-related colleges violates the Establishment Clause. Appellants concede the Act has a secular purpose (the first part). Crucial to the determination of whether such aid has the primary effect of advancing religion (the second part) or causes excessive governmental entanglement with religion (the third part), are two factual issues: Does the aid flow to an institution where religion is pervasive? Is the aid restricted to secular and nonideological functions?

This Court has consistently examined the particular functions of Church-related institutions to determine whether public aid to those functions violates the Establishment Clause. Where religious and church-related institutions have performed secular functions of such social utility that legislatures have decided to assist those functions, this Court has upheld such aid under the Establishment Clause, notwithstanding the fact that the functions may have been motivated by religious beliefs or performed by members of a religious institution.

Aid to church-related institutions performing secular functions must be restricted to use for those functions. This Court has established two distinct standards setting forth the degree to which such statutory

restrictions must be specified. Where an aid program involves educational institutions whose religious and educational programs are inseparable, the aid must be specifically limited to particular categories of secular services, unrelated to the primary, religious-oriented educational functions. A different standard has been applied to institutions performing secular educational functions. This Court has upheld aid to such colleges where the statutory restriction contained a statement specifically forbidding use for religious purposes; no designation of a specific secular category was found to be required by the Establishment Clause where religion did not permeate the educational functions.

II.

Because the character of the recipient colleges is not pervasively sectarian, aid to these colleges does not have the primary effect of advancing religion. *Tilton v. Richardson, supra.* Administrative procedures, well established in the academic community, have been adopted to insure use for educational purposes. The court below found these proposed practices satisfactory, even though the State had not been able to demonstrate the actual use of the procedures at trial, because the restricted aid was in escow. Appellants' objections as to prior use of funds pertain to funds distributed under the original Act, which did not contain restrictions as to sectarian use.

St. Joseph College is an autonomous college and is neither controlled by any church or religious organization, nor subject to any religious quotas for Board membership. There are no religious restrictions or criteria in recruiting or hiring faculty. There are no religious restrictions or criteria in admitting students or awarding financial aid. Religious activities are



limited to non-compulsory opportunities or occasions for religious experience. There is no College policy encouraging prayer in the classroom, but it occurs on a voluntary basis. The Theology Department does not attempt to inculcate religious values. The College abides by established principles of academic freedom. Religion does not permeate the cultural and social aspects of the College. Providing a secular education is the predominant purpose of St. Joseph College.

The statutory language of the Maryland Act is very similar to the statute approved by this Court in *Tilton, supra.* Seminaries are ineligible. Aid cannot be used for sectarian activities. The Court below construed the Act to forbid aid to theology departments, a requirement similar to a restriction in the *"Tilton* statute".

The administration of the Act requires that the use of the aid for non-sectarian purposes be designated, under oath, by the college President, a procedure similar to the grant application procedure approved in *Tilton. Tilton v. Finch, infra.* Follow-up by verification of the use is required, and, if necessary, a simple audit can be required. A method of fund accounting is presently used by the colleges to meet the requirements of many federal grants and programs and the colleges are experienced with this method.

The fact that the Maryland Act does not specify particular educational purposes for the aid is as constitutionally insignificant as the fact that the *"Tilton* statute" did not specify the particular educational use of the facility or the educational activities to take place within the facility except to the extent of excluding sectarian uses. The Establishment Clause requires exclusion of use for religious purposes, not a classification of the particular educational purposes.

III.

Unlike a church elementary school, religion does not so permeate the fabric of the educational programs at the recipient colleges so to require the State to scrutinize the daily operations of the institution to "weed out" religion from educational functions. The religious functions at the colleges are limited and identifiable and can be excluded from State aid by the established practice of designation, verification under oath, and fund accounting. Even though the aid is continuing, the nature of the schools does not require a continuous intensive surveillance of the colleges. Surveillance, not a mere continuous relationship, causes entanglement. Continuing relationships with educational institutions already exist in the form of governmental requirements for licensure, accreditation and grant programs.

Political entanglement will not result from the Maryland aid program, as the church-related colleges are a small percentage of the private colleges receiving aid.

IV.

The principles of *Lemon II, infra,* require that St. Joseph College not be required to return funds received under the Act, even if the Act is held to violate the Establishment Clause. The College has relied upon the Maryland legislature, the Maryland Governor and Board of Public Works, a three judge federal court and this Court which refused to enjoin disbursement of the funds. If this Court holds the Maryland program to be unconstitutional, such a decision was not foreshadowed when the aid was paid by the State. The aid was paid after a District Court of three judges applied the established principles of this Court and found the program constitutional. Repayment of the funds will



not remedy "advancement of religion", if any, or "entanglement" if any, which has already occurred and is not necessary to protect constitutional principles upon which any holding of unconstitutionality might be based.

## ARGUMENT

I.

**THIS COURT HAS UPHELD PUBLIC AID TO CHURCH-RELATED COLLEGES WHERE THE COLLEGES WERE NOT PERVASIVELY SECTARIAN AND WHERE THE AID WAS RESTRICTED FROM USE FOR RELIGIOUS ACTIVITIES.**

In judging the constitutionality of various forms of public assistance to church-related educational institutions, this Court has applied the three-part test stated in several recent Establishment Clause cases. *Meek v. Pittenger,* 43 U.S.L.W. 4596 (No. 73-1765, May 19, 1975); *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756 (1973); *Levitt v. Committee for Public Education & Religious Liberty,* 413 U.S. 472 (1973); *Sloan v. Lemon,* 413 U.S. 825 (1973); *Hunt v. McNair,* 413 U.S. 734 (1973); *Tilton v. Richardson,* 403 U.S. 672 (1971); *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

> "First, the statute must have a secular legislative purpose. [Citation omitted]. Second, it must have a 'primary effect' that neither advances nor inhibits religion. [Citation omitted]. Third, the statute and its administration must avoid excessive government entanglement with religion." *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4598.

Appellants do not contest the conclusion of the court below that "the statute was enacted with a secular purpose" (App. to Jur. St. 9). Appellants do question the holdings of the court below "that the statute has not

had the primary effect of advancing or inhibiting religion" (App. to Jur. St. 9); and that the "relationship between church and state which results from this aid program is not entangling" (App. to Jur. St. 17).

In each case reviewed by this Court, the "primary effect" and "entanglement" issues turned upon (a) the nature of the institution and (b) the nature of the aid.

The first pivotal issue of fact is whether the recipient institution is pervasively sectarian.

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which *religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.*" *Hunt v. McNair, supra,* 413 U.S. 734, 743 (emphasis supplied).
>
> "The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use *varies in large measure with the extent to which religion permeates the institution.*" *Hunt v. McNair, supra,* 413 U.S. 734, 746 (emphasis supplied).

The second pivotal issue of fact is whether the character of the aid is restricted to use for "secular" and nonideological" purposes. *Tilton v. Richardson, supra,* 403 U.S. 672, 679; *Committee for Public Education and Religious Liberty v. Nyquist, supra,* 413 U.S. 756, 780.

### A. This Court Has Consistently Examined The Particular Functions Of Church-Related Institutions To Determine Whether Public Aid To That Function Violates The Establishment Clause.

Although the three-part test was first stated in *Tilton* and *Lemon,* the examination of the nature of church-related institutions receiving governmental assistance is not new to this Court in Establishment Clause cases.



In *Bradfield v. Roberts,* 175 U.S. 291 (1899), this Court upheld an Act of Congress appropriating funds to be paid to Providence Hospital for the construction of a building to house poor patients with contagious diseases. The hospital was owned and operated by the Sisters of Charity of Emmitsburg, Maryland. The Court's holding was based upon its finding that the function of the institution was not religious:

> "The above-mentioned allegations in the complainant's bill do not change the legal character of the corporation or render it on that account a religious or sectarian body. Assuming that the hospital is a private eleemosynary corporation, the fact that its members, according to the belief of the complainant, are members of a monastic order or sisterhood of the Roman Catholic, and the further fact that the hospital is conducted under the auspices of said church, are wholly immaterial, as is also the allegation regarding the title to its property. The statute provides as to its property and makes no provision for its being held by anyone other than itself. *The facts above stated do not in the least change the legal character of the hospital, or make a religious corporation out of a purely secular one as constituted by the law of its being.* Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church. To be conducted under the auspices is to be conducted under the influence or patronage of that church.

The meaning of the allegation is that the church exercises great and perhaps controlling influence over the management of the hospital. It must, however, be managed pursuant to the law of its being. That the influence of any particular church may be powerful over the members of a nonsectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body. That fact does not alter the legal character of the corporation, which is incorporated under an act of Congress, and its powers, duties, and character are to be solely measured by the charter under which it alone has any legal existence. There is no allegation that its hospital work is confined to members of that church or that in its management the hospital has been conducted so as to violate its charter in the smallest degree. *It is simply the case of a secular corporation being managed by people who hold to the doctrine of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists.* The charter itself does not limit the exercise of its corporate powers to the members of any particular religious denomination, but, on the contrary, those powers are to be exercised in favor of anyone seeking the ministrations of that kind of an institution. All that can be said of the corporation itself is that it has been incorporated by an act of Congress, and for its legal powers and duties that act must be exclusively referred to. As stated in the opinion of the court of appeals, *this corporation 'is not declared the trustee of any church or religious society.* Its property is to be acquired in its own name and for its own purposes; that property and its business are to be managed in its own way, subject to no visitation, supervision, or control by an ecclesiastical authority whatever, but only to that of the government which created it. In respect, then, of its creation, organization, management, and ownership of property it is an



ordinary private corporation whose rights are determinable by the law of the land, and the religious opinions of whose members are not subjects of inquiry'." 175 U.S. 291, 297-99 (emphasis supplied).

The *Bradfield* case is similar to the case at hand in another respect. The plaintiff alleged that the hospital had a "sectarian character" 175 U.S. 291, 292, but failed to prove his allegation:

> "If we were to assume, for the purpose of this question only, that under this appropriation an agreement with a religious corporation of the tenor of this agreement would be invalid, as resulting indirectly in the passage of an act respecting an establishment of religion, we are unable to see that the complainant in his bill shows that the corporation is of the kind described, but on the contrary he has clearly shown that it is not." 175 U.S. 291, 297.

While the *Bradfield* case is not controlling here, it illustrates that where a church-related institution performs a secular work of such social utility that the legislature has decided to assist the work, the applicable criteria in applying the Establishment Clause requirements is the nature of the work, not the religious motivation for the work nor the religious beliefs of the corporate members undertaking the work.

This Court has been faithful to this criteria in *Tilton, Lemon* and the subsequent Establishment Clause cases. It has scrutinized the work and proceeded from that finding to define the Establishment Clause "lines of demarcation." *Lemon v. Kurtzman, supra,* 403 U.S. 602, 612.

The case of *Walz v. Tax Commission,* 397 U.S. 664, (1970) provides a direct and recent confirmation that

religious organizations, even churches, are not, by reason of their religious beliefs and activities, barred from receiving governmental aid (tax-exempt status) as a result of their function of providing "beneficial and stabilizing influences in community life" and fostering "moral and mental improvement" in a "harmonious relationship to the community at large". 397 U.S. 664, 672-73. Significantly, this Court upheld the functional classification of property owned by religious corporations as within "a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historic, and patriotic groups." 397 U.S. 664, 673.

Mr. Justice Douglas, dissenting, in *Walz,* recognized and supported the functional distinction between a religious organization performing secular, as opposed to sectarian, activities.

> "The church *qua* church would not be entitled to that support from believers and from non-believers alike. Yet the church *qua* nonprofit, charitable institution is one of many that receive a form of subsidy through tax exemption." 397 U.S. 664, 707.

Mr. Justice Douglas' dissent was based upon the failure of the statute to provide tax exempt status for organizations of non-believers as well as churches. He felt that this exclusion violated governmental neutrality toward religion required by the Establishment Clause.

Mr. Justice Brennan, concurring, expressed the functional distinction in terms of "principal effect":

> "Against the background of this survey of the history, purpose, and operation of religious tax exemptions, I must conclude that the exemptions do not 'serve the essentially religious activities of religious institutions'. Their principal effect is to



carry out secular purposes — the encouragement of public service activities and of a pluralistic society. During their ordinary operations, most churches engage in activities of a secular nature that benefit the community; and all churches by their existence contribute to the diversity of association, viewpoint, and enterprise so highly valued by all of us." 397 U.S. 664, 692-93.

> "The means churches used to carry on their public services activities are not 'essentially religious' in nature. They are the same means used by any purely secular organization — money, human time and skills, physical facilities. It is true that each church contributes to the pluralism of our society through its purely religious activities, but that state encourages these activities not because it champions religion *per se* but because it values religion among a variety of private, nonprofit enterprises that contribute to the diversity of the Nation." 397 U.S. 664, 693.

The opinions expressed by both the majority and dissenting Justices in *Walz,* emphasize the functional distinctions the Supreme Court has historically recognized in determining what is "religion" for purposes of applying the Establishment Clause. *Walz,* establishes that governmental aid to functions which are non-religious is not precluded by the Establishment Clause, merely because the functions are motivated by religious beliefs or carried out by religious organizations.

This Court has stated and followed the "function" criteria in the most recent public aid to private education cases beginning with *Tilton* and *Lemon.* In each case where the Court found the function to be predominantly educational, the aid program was upheld. *Tilton v. Richardson, supra; Hunt v. McNair, supra.*

In *Tilton* and *Hunt*, this Court found that the facts supported its observation that "college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines." *Tilton v. Richardson, supra,* 403 U.S. 672, 686.

> "On the record in this case there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education." *Hunt v. McNair, supra,* 413 U.S. 734, 744.
>
> "In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education." *Tilton v. Richardson, supra,* 403 U.S. 672, 687.

In each case where the educational functions were pervaded by religious functions, the aid program was struck down. *Meek v. Pittenger, supra; Committee for Public Education and Religious Liberty v. Nyquist, supra; Levitt v. Committee for Public Education and Religious Liberty, supra; Sloan v. Lemon, supra; Lemon v. Kurtzman, supra.*

Indeed the most recent case before this Court is replete with references to the religious character of the schools. See 43 U.S.L.W. 4596, 4600-02.

> "But we agree with the appellants that the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion *because of the predominantly religious character of the schools benefiting from the Act.*" *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4600 (emphasis supplied).

The nature of the function receiving public assistance is not only a crucial fact in itself, in applying the "primary effect" and "entanglement" tests, it is also critical in evaluating the second crucial fact — the degree to which the aid must be restricted.



### B. While This Court Has Required Public Aid Involving Pervasively Sectarian Institutions To Be Specifically Categorized And Narrowly Prescribed, It Has Required Aid To Institutions With Secular Educational Programs To Be Limited Only By Negative Restrictions Preventing Use For Religious Purposes.

In evaluating the nature of public aid to private educational institutions, this Court has established two standards specifying the degree to which public aid to private schools must be restricted: one standard applicable to aid programs involving pervasively sectarian schools; and a second standard for aid to colleges whose functions are predominantly educational.

Aid involving pervasively sectarian schools may include programs "made available to all students" and may include "church-related schools in programs providing bus transportations, school lunches, and public health facilities — secular and nonideological services *unrelated to the primary, religious-oriented educational function* of the sectarian school." *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4600 (emphasis supplied).

The reason why the aid must be restricted from the educational function of the religious schools is because "it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role [of these schools]". *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4601.

While aid to pervasively sectarian schools must be categorized to meet the narrowly prescribed programs upheld in *Meek v. Pittenger, supra; Board of Education v. Allen,* 392 U.S. 236 (1968); and *Everson v. Board of Education,* 330 U.S. 1 (1947); no such specific categorization is necessary in schools whose predominant purpose is to provide a secular education. In such schools, religion does not pervade the educational programs and religious functions are separate and identifiable.

This Court has held that negative restrictions prohibiting aid for sectarian purposes are sufficient to safeguard the Establishment Clause prohibition in aid programs to church-related colleges which are not pervasively religious, *Tilton v. Richardson, supra; Hunt v. McNair, supra;* and therefore there is no Establishment Clause requirement that the aid program further specify the particular categories of the secular educational programs which may receive aid.

This Court has repeatedly held that where public aid is appropriately restricted to use for educational purposes, the fact that religious programs may indirectly benefit does not violate the Establishment Clause. *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4600; *Hunt v. McNair, supra,* 413 U.S. 734, 742-43.

Where the predominant function of a church-related college is to provide a secular education, and where aid to the college is restricted from use for religious purposes, the mechanical application of the Establishment Clause tests prescribed by this Court compels the conclusion that there is no primary effect of advancing religion, and there is no governmental entanglement with religion.



## II.

### THE MARYLAND AID PROGRAM DOES NOT HAVE THE PRIMARY EFFECT OF ADVANCING RELIGION.

In order to sustain Appellants' contention that public aid to the Appellee colleges has the primary effect of advancing religion, Appellants must prove that "religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable." *Tilton v. Richardson, supra,* 403 U.S. 672, 680. See *Hunt v. McNair, supra,* 413 U.S. 734, 743.

#### A. The Maryland Aid To St. Joseph College Does Not Advance Religion Because The College Is Not Pervasively Sectarian.

The court below held that neither St. Joseph College nor the other Appellee colleges are "pervasively sectarian" (App. to Jur. St. 10-11) and this finding is buttressed by the evidence.

The Court below found that the Appellee colleges conform closely to the colleges in *Tilton* (App. to Jur. St. 10-11). Appellants, however, contend that the Appellee colleges are "sectarian" (Appellant's Brief, pp. 74-75). Because Appellants base their contention upon conclusions unsupported by the evidence, it is necessary to set forth at length the factual basis of the trial court's findings:

1. As to institutional autonomy the trial court concluded: "The defendant Maryland schools are characterized by a high degree of institutional autonomy. The affiliated institutions exercise no control over the budget or policies of the schools." (App. to Jur. St. 11, n. 7).

The following facts support this conclusion as to St. Joseph College:

The purpose of St. Joseph College, as stated in its charter and by-laws, is to operate a four year collegiate program of education and to award degrees (Tr. 52; JX 1, p. 1, Tr. 51; JX 3, p. 1, Tr. 51). There are no statements in the corporate charter, corporate by-laws, or administrative by-laws referring to the Catholic Church or any religious denomination or belief (JX 1, Tr. 51; JX 2, Tr. 51; JX 3, Tr. 51). The charter, corporate by-laws and administrative by-laws provide that the affairs of St. Joseph College shall be managed by a Board of Trustees and that all powers of the corporation are vested in the Board of Trustees (JX 1, p. 2, Tr. 51; JX 2, p. 1, Tr. 51; JX 3, p. 1, Tr. 51). An Associate Board is appointed by the Board of Trustees and is responsible for advising the President (Tr. 91-2; JX 2, pp. 3-4, Tr. 51; JX 3, p. 1, Tr. 51). There is no requirement or policy in the corporate charter, by-laws, or any corporate documents that the Trustees, Associate Trustees, administrative officers, faculty or any member or percentage of members thereof, be Catholic, belong to any religious order or organization, or hold any position with any religious order or organization (Tr. 88-89; JX 1, Tr. 51; JX 2, Tr. 51; JX 3, Tr. 51). St. Joseph College does not receive any financial assistance from the Catholic Church, any archdiocese, or any financial committee or entity representing the Catholic Church (Tr. 89, 125). The Board of Trustees, Associate Board, administrative officers and faculty of St. Joseph College are not required, by corporate charter, by-laws or any other document, to report to, account to or in any manner be responsible to the Catholic Church, any religious organization or any members thereof (JX 1, Tr. 51; JX 2, Tr. 51; JX 3, Tr. 51). The Board of Trustees, administrative officers and faculty of St. Joseph College, in fact, have not been required and do not report to, account to, and in no manner are they responsible to the Catholic Church or any religious organization external to the College (Tr. 78-79, 88, 114, 125, 134, 174, 646-47). The President of St. Joseph College testified that the Daughters of Charity of St. Vincent De Paul, (her religious community), "in no way whatsoever . . . have anything to do with the internal running of St. Joseph College" (PX 21, p. 4, Tr. 49). The President testified that the Board of Trustees, in fact makes all of the policy decisions of the College (Tr. 79). The President testified that no member of the Daughters of Charity or any other organization outside of the College has attempted to influence her in her duties as President (Tr. 78). The President testified that, in fact, she is accountable only to the Board of Trustees in the discharge of her professional responsibilities (Tr. 78). She testified that there were "no strings attached" to the financial assistance received by the College from the Daughters of Charity of St. Vincent De Paul (Tr. 125).



2. As to the absence of religious restrictions in faculty hiring, the court below found that academic qualifications were the main criteria for hiring faculty and that there was no religious bias in selecting faculty (App. to Jur. St. 41).

Appellants' contention that there are "religious restrictions on faculty appointments" is not supported by the record.

The testimony of the President of the College is explicit on the point:

> "Q. Are applicants for faculty appointments required to state their religion? A. No, they are

not. When they write to us, they present a resume. Sometimes their religion is on it; sometimes it is not, but we don't inquire into it. Q. In discussing their qualification for appointment, do you ever consider the religion of a particular applicant? A. No. I think the important thing is their professional competence." (Tr. 79, 80).

The President testified that the College imposed no religious restrictions upon the hiring of faculty to teach theology courses (Tr. 117-19; See also Tr. 96, 244-45).

3. As to the absence of religious restrictions on student admissions, the trial court found that "thorough analysis of the student admission and recruiting criteria of each defendant demonstrates that the student bodies are chosen without regard to religion." (App. to Jur. St. 44).

Appellants maintain that St. Joseph College has perpetuated "de facto religious restrictions" on student admissions by concentrating recruiting efforts largely toward students of a particular faith (Appellants' Brief, pp. 66-67). This contention is not supported by the evidence.

The evidence shows that St. Joseph College had a policy of recruiting at public high schools (PX 21, pp. 94-95, Tr. 49) and, in fact, that of the high schools visited, *87% were public high schools* (JX 32, last page, Tr. 51). The 87% figure was produced by an examination of recruiting records requested by Appellants at trial (Tr. 384-85).

The evidence showed that there are no religious requirements or religious criteria used in determining student admissions (Tr. 90, 157-58) or granting financial aid (Tr. 91, 319) and that this policy is set forth in the College catalog (PX 1, p. 5, Tr. 51).



There are no religious restrictions on student admissions at St. Joseph College, *de facto* or otherwise.

4. As to religious activities, the Appellants contend that the trial Court found that "one secondary objective" of the Appellee colleges was "to encourage spiritual development of the students" and that "some of the defendants seem more caught up in this idea than others . . ." (Appellants' Brief, p. 20).

But the finding of the trial Court states in full:

> "Though some of the defendants seem more caught up in this idea than others, *at none of these institutions does this encouragement go beyond providing the opportunities or occasions for religious experience.*" (App. to Jur. St. 45, emphasis supplied).

The evidence is overwhelming that such occasions and opportunities for religious worship are purely voluntary, and no pressure is placed on students or faculty to attend (See App. to Jur. St. 44; Tr. 90, 92, 93, 101, 150, 159-61).

The trial court found that "no aspect of the student conduct code has any religious content" (App. to Jur. St. 44). The evidence is clear that there are no religious inhibitions imposed on any aspect of student life at St. Joseph College (Tr. 60, 61, 136-39, 140-43, 146-49, 153-54).

5. As to prayer in classrooms, the trial court found that there is no policy encouraging prayer in classrooms at the Appellee colleges, but that some individual instructors do so as a facet of their academic freedom (App. to Jur. St. 39; See Tr. 42, 119-21, 211, 255).

The trial court relying upon the atmosphere of academic freedom existing at the College, and upon the

testimony of a Maryland Department of Education staff member thoroughly familiar with the college,[2] characterized the effect of such prayers as "peripheral":

> "In fact, at St. Joseph's College, the only defendant at which a majority of classes start with prayer, a Maryland education department group which monitored the teachers education program at the College saw no evidence of religion entering into any elements of that program. It appears that prayer in class is as peripheral to the subject of religious permeation of an institution as are the facts that some instructors wear clerical garb, and some classrooms have religious symbols. None of these facts impairs the clear and convincing evidence that courses at each defendant are taught 'according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards.' *Tilton v. Richardson, supra,* 403 U.S. 681." (App. to Jur. St. 40).

6. As to the Theology Department, the trial court found that it was "unable to characterize the manner in which theology and religious courses are conducted." (App. to Jur. St. 42).

Appellants, however, ignore the fact that they offered no proof on the point, and assert the "non-finding" as a statement of the existence of a "characteristic". (Appellants' Brief, p. 69).

In this Court, Appellants argue the same facts that failed to convince the trial court that any inculcation of religious values took place at St. Joseph College. The facts asserted by Appellants consist of phrases contain-

[2] The staff member evaluated the teacher education program at St. Joseph College, for purposes completely unrelated to the Maryland Act before this Court. The evaluation involved extensive monitoring of virtually the entire academic program (Tr. 354-80).



ing theological terminology elicited in answer to counsel's examination concerning the personal religious beliefs of the witnesses and the meanings of certain theological concepts (App. to Jur. St. 70-71).[3] The fact that theology courses contain such subject matter and concepts does not mean that the teachers inculcate these concepts. Such an analysis would hold a political science professor to be a communist for teaching about Marxism.

The evidence is that religious concepts are taught as academic disciplines without subjecting students to an indoctrination based upon the teacher's personal beliefs, or the beliefs of any particular religion.

Testimony by a member of the curriculum committee, which defined the purposes and objectives of the theology courses of study, showed that the committee regarded theology as an academic discipline and that the committee treated it as such (Tr. 196-97). The committee applied professionally accepted guidelines to the development of the theology course of study (Tr. 201-04). The committee established as goals of the Theology Department to introduce students to the methodology of the subject and to understand all sides of the issues presented in order to properly evaluate any point of view (Tr. 193, 204; JX 8; p. 18, Tr. 51). The committee designed the theology program with the presumption, based on the committee's knowledge of the faculty, that the courses would be taught objectively as a discipline according to accepted professional standards (Tr. 228-29).

The emphasis of providing students with the academic tools of inquiry was supported by a written

[3] References to the testimony on this point are collected in Appendix A to [Post-Trial] Brief of St. Joseph College, R. 1527, 1539-52.

statement of the President emphasizing the need to explore other philosophies and beliefs in a questioning and decision making process (Tr. 57; JX 26, p. 5, Tr. 51).

The testimony of the Chairman of the Theology Department was as follows:

> "Q. Just from your own viewpoint and experience as a teacher, do you consider the college classroom a proper or appropriate forum or place for a teacher to advocate his or her particular personal religious beliefs? A. Oh, no, they wouldn't pay attention today if you did. They all have their own ideas concerning things today. No, we don't.
>
> Q. You don't consider this is a proper place for it? A. No, I don't." (PX 22, p. 20, Tr. 49).

It is significant that in the Appellants' Brief, in citing the Chairman's testimony as to the purpose of the Theology Department, the quotation is cut off in mid-sentence (Appellants' Brief, p. 70). The remainder of the sentence illustrates that the Department has the purpose of teaching the similarities between religions and the common bonds of people in our society resulting therefrom:

> ". . . since Scripture is the bridge between people of all denominations, to probably make them understand what a powerful source it would be for humanism, I mean, because the non-Catholics and ourselves do believe about the same things with regard to Scripture, both Old and New Testament, the scriptural exegesis, whether they are Protestant or Catholic, usually hold the same thing.
>
> So, it's a good field for promotiong conversation among other groups and making them feel our sense, our bond of unity. There are more things that unite us than separate us with other groups." (PX 21, p. 5, Tr. 49).



The Chairman of the Theology Department testified that most of the courses emphasized the study of Christian beliefs, but that the department offered courses studying a variety of religious beliefs and subjects (PX 22, pp. 11-13, Tr. 49). The College sponsored a seminar in "Contemporary Theology", inviting clergymen and scholars of a variety of beliefs to lecture at the College (PX 22, pp. 7-9, Tr. 49). The College library makes available to students treatises, references and resources on a variety of religions and religious topics (PX 22, p. 19, Tr. 49).

There was unrebutted testimony that all of the courses taught in the Theology Department were taught as academic disciplines and that there was no attempt to indoctrinate students (Tr. 151-52, 196-98, 228-29; PX 22, p. 20, Tr. 49).

The colleges presented expert testimony that the offering of courses in religion has greatly expanded among private and public colleges since World War II and that the teaching of religion is generally viewed by the academic community as an academic discipline (Tr. 1634-35); that the study of religion is a common and natural area of study in a liberal arts curriculum because religion is a significant aspect of human experience (Tr. 1638); that in the United States, the emphasis in the study of religion has been on the study of the Christian tradition because of the historical and cultural affinities of the Western Hemisphere (Tr. 1638); and that the study of Scripture and theological methodology are typical in the academic study of religion (Tr. 1636-38).

The finding of the trial court that there is a possibility for deepening religious experiences in a particular faith at the colleges because religious

teachers teach religious subjects (App. to Jur. St. 13) is a far cry from Appellants' unfounded assertion that inculcation of religious values is a fact at St. Joseph College, particularly when the evidence shows that it was not, and the trial court generally found that ". . . religious indoctrination is not a substantial purpose or activity of any of these defendants" (App. to Jur. St. 47).

7. As to academic freedom, the finding of the trial court that complete academic freedom existed at St. Joseph College, with respect to faculty and students (App. to Jur. St. 11, 38, 40-42) is unchallenged by Appellants in this forum.

8. As to the curriculum, the trial court found that ". . . these schools perform essentially secular educational functions . . . religion does not permeate the secular educational functions of these schools." (App. to Jur. St. 14).

It was stipulated that Saint Joseph College is an undergraduate liberal arts college granting Bachelors of Arts and Bachelors of Science degrees in the major fields of biology, chemistry, education, English, government history, mathematics, social welfare, Spanish, French, home economics and nursing (Tr. 52). More than 75% of the graduates of the College major in education, nursing and social work (Tr. 53). The College is accredited by the Maryland State Board of Education and the Middle States Association of Colleges and Secondary Schools (PX 1, p. 83, Tr. 49). Its teacher education program is accredited by the Maryland State Department of Education, Division of Certification and Accreditation of Teacher Education (Tr. 355, 360). Its social work program is accredited by the Council on Social Work Education (JX 11, p. 1, Tr. 51). Its nursing



program is accredited by the Maryland State Board of Examiners of Nurses (JX 41, Tr. 51) and the National League for Nursing (JX 1, p. 83, Tr. 51). Seven national honor societies maintain local chapters at the College (Tr. 53-54). The College maintains membership in eleven national and regional professional academic associations (Tr. 83-84; PX 1, p. 83, Tr. 49).

Testimony of the President and various faculty members showed that there are no restrictions other than accepted standards of professional conduct, on the subject matter taught or the manner in which the subject is taught (Tr. 72, 270, 278, 279, 345). Each faculty member writes his own course outline (Tr. 72, 245). There are no restrictions or censorship in the selection of textbooks or ordering and using library resources (Tr. 72, 89, 245, 345, 347). Faculty members testified that they felt free to teach subject areas which might be considered "controversial" with respect to the Catholic Church (Tr. 248-49, 262-65, 275-79, 346).

The facts and evidence in this case support the findings of the court below that St. Joseph College is not pervasively sectarian.

Given the nature of the Appellee colleges, the Maryland Act does not have the primary effect of advancing religion unless the Act, or its administration, fail to restrict the aid to the Constitutionally permissible purposes.

### B. The Maryland Act Prohibits Aid For Sectarian Purposes And The State Has Established Procedures To Enforce the Restrictions.

The court below described the administrative mechanism by which the Maryland Council for Higher Edu-

cation proposed to implement the statutory restrictions on sectarian use:

> "The Act prescribes two levels of screening. The first is a pre-eligibility determination based primarily on the Act's requirement that aid not go to institutions awarding primarily theological or seminary degrees. Several institutions have been disqualified in this manner, and there has been no serious suggestion that institutions found eligible violate the standard, or that this determination entangles the Council in religion.
>
> "The second level of screening is a determination of whether state funds have been improperly used. After the program was in operation and one year's funds awarded, the statute was amended to prohibit the use of state funds for 'sectarian purposes.' Chap. 534, 1972 Laws of Maryland, Art. 77A, § 68A, Annotated Code of Maryland (1969 Replacement Vol.). That statutory stricture is implemented through requirements of verfication by the college president before receipt that funds will not be improperly expended, and verification one year thereafter that funds have not been improperly used. The Council requires sufficient detail, through follow-up on the usage description which accompanies the second verfication, to determine whether the expenditure was for sectarian use. (The pre-amendment funds awarded for degrees conferred during the 1970-1971 academic year were never subjected to this second level of screening.)
>
> "The usage verification and the normal annual accounting which each college conducts obviate the need for post-audit analysis in every case. Such analysis is available when needed, however. State auditors could accomplish a post-audit analysis, using accepted accounting techniques, in one day or less" (App. to Jur. St. 47-48).

Appellants continue to maintain that the Maryland aid is "undefined" and "virtually unlimited" (Appellants' Brief, p. 22). It is therefore necessary to set forth at length the compelling parallels between the Maryland program and the aid program upheld by this Court in *Tilton*.



1. *The Statutory Restrictions*

The restrictive clauses of the Higher Education Facilities Act of 1963, 77 Stat. 364, as amended, 20 U.S.C. §§ 711-721 (1964 ed. and Supp. V), upheld in *Tilton* and the Maryland Act would be difficult to distinguish, but for the citations.

> "[A]ny facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility which . . . is used or to be used primarily in connection with any part of the program of a school of department of divinity . . ." *Tilton v. Richardson, supra,* 403 U.S. 672, 675.
>
> "None of the monies payable under this subtitle shall be utilized by the institution for sectarian purposes." Maryland Annotated Code, Article 77A, § 68A (App. to Jur. St. 54).
>
> "The institution cannot be one awarding only seminarian or theological degrees; . . ." Maryland Annotated Code, Article 77A, § 66(d) (App. to Jur. St. 53).

The statute upheld in *Hunt* contained similar restrictive language.

> "[A]ny facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." *Hunt v. McNair,* 413 U.S. 734, 736-37.

The conclusions of the Appellants that the aid considered in *Tilton* was "narrowly limited" while the aid under the Maryland Act is "virtually unlimited

[and] undefined" must be based upon a Constitutional subtly not apparent from a comparison of the printed word (See Appellants Brief, p. 22).

The fact that the Maryland Act does not specify particular educational purposes for the aid is as constitutionally insignificant as the fact that the "*Tilton* statute" did not specify the particular educational use of the facility or the educational activities to take place within the facility except to the extent of excluding sectarian uses.

There are two differences in the statutory restrictions, however, one of which the court below held not to reach constitutional dimensions, and one of which was removed by judicial construction.

The *Tilton* and the *Hunt* programs provided aid for the construction of "facilities." As the court below pointed out, the only limitations on the purpose of the facilities and the activities carried on in the facilities was the restrictive language similar to that of the Maryland Act:

> "The Maryland aid program is characterized by direct non-categorical grants restricted by a prohibition on use for sectarian purposes. Leaving aside the question of the efficacy of this prohibition, the differences between this program and the *Tilton* program are more apparent than real. In *Tilton* direct grants were available for the construction of virtually any type of building, subject to similar prohibitions against sectarian usage. Thus, the *Tilton* funds were used to construct two libraries, a music, drama and arts building, a science building and a language laboratory. Every non-sectarian program in the defendant colleges could be benefited by the federal aid program, and the difference between the *Tilton* aid program and the Maryland aid program thus resolves itself into a difference



> between construction grants and non-categorical grants. Clearly the latter distinction does not rise to constitutional dimensions." (App. to Jur. St. 17).

The second distinction is that in *Tilton*, the statute forbade aid "to be used primarily in connection with any part of the program of a school *or department of divinity,*" while the parallel Maryland statutory restriction forbids aid to *institutions* awarding only seminarian or theological degrees. While St. Joseph College does not have a department of "divinity" it does have a Department of Theology (but does not recognize a "major" in theology), and the court below construed the statute as excluding aid to this department. This construction in effect reconciles the Maryland Act with the similar restriction in the *"Tilton* statute".

2. *The Administrative Process*

In administration, the Maryland aid program initially eliminates from eligibility colleges which primarily award theological degrees (App. to Jur. St. 18). As to the eligible colleges, the president must verify, under oath, before and after receipt of the funds that they will be used for purposes permitted by the statute (App. to Jur. St. 48). The State administering body "requires sufficient detail, through follow-up on the usage description which accompanied the second verification, to determine whether the expenditure was for sectarian use" (App. to Jur. St. 48).

Once the use made of the aid is identified by the college and approved by the administering body, an auditing procedure is available, if required, to verify that the funds are used for the purposes stated. The court below found that the technique of fund accounting to comply with grant restrictions is in use at the

colleges to comply with federal grant programs and that any audit required by the Maryland program would be "quick and non-judgmental" (App. to Jur. St. 48).

This two-step "before and after" verification procedure is essentially the type of procedure used to ensure proper use of funds received under the Higher Education Facilities Act of 1963. (See the lower Court decision in *Tilton,* i.e. *Tilton v. Finch,* 312 F. Supp. 1191, at 1202 (D. Conn. 1970). Under that Act, the college first identified the particular "facility" desired under the program in its application, and was required to provide "assurances" that "no part of the areas included in the proposed project will be used for such proscribed purposes." *Tilton v. Finch, supra,* 312 F. Supp. 1191, 1202.

Appellants contrast the Maryland aid with the "Tilton" aid:

> "The Maryland aid is paid directly to church related and other institutions of higher education A.52. Each institution determines for itself how its share will be used. R.1582-1583. There are no restrictions as to use of the aid, except use for sectarian purposes is proscribed. A.54." (Appellants' Brief, p. 30).

Each of the above so-called "contrasting" factors are actually parallel factors.

In essence, the only difference between the Maryland Act and the act upheld in *Tilton,* is that the Maryland aid is restricted to purposes verified by the College to be non-sectarian purposes, while the federal act was restricted to facilities, the purposes for which were verified by the colleges to be non-sectarian purposes.

Appellants contend that the State's enforcement will be ineffective, citing the finding of the court below that



the available audit procedure is "non-judgmental" (Appellants' Brief, p. 56). It is clear, however, that it is not the availability of the audit procedure which is the primary mechanism of enforcement. The audit procedure is just an additional mechanism which is "available when needed" as a "mechanical accounting of state grant expenditures" (App. to Jur. St. 48). The actual "judgment" as to proper usage is made by the administering body upon the verification of purpose by the college president, just as the applications for grants are reviewed under The Higher Educational Facilities Act. The function of the auditor, if needed, is to see that the money was spent for the purposes approved by the administering body.

Appellants also allege several failures by the Maryland Council for Higher Education in its review of funds expended:

> "In fact, at least one defendant (Loyola College) has already used aid for this purpose [scholarships]." (Appellants' Brief, p. 51).
>
> "By commingling aid with general college operating funds, two appellees have already used aid for building maintenance." (Appellants' Brief, p. 55).
>
> "Although the State requires recipient institutions to adopt internal accounting and administrative procedures to control the use of aid, it fails to attempt any review of the adequacy of such procedures." (Appellants' Brief, p. 56).

Appellants overlook the fact that at the time of trial, the only funds paid out to church-related institutions under the Act, were paid under the original statute (Chapter 626, Acts of 1971) *which did not require any restriction on the use of the funds by the colleges.* At the time of trial, the "restricted" funds were still in escrow. (App. to Jur. St. 37, n. 2).

After extensive testimony, the court below concluded that the State was able and prepared to enforce the restriction:

> "The procedural posture of this case has prevented the development of follow-up procedures to ensure that no state funds are converted to religious uses in later years. However, unlike the 20-year restriction held unconstitutional in *Tilton*, the prohibition on sectarian use in the statute is absolute, and the Council seems aware of its responsibilities in this matter. The Court is satisfied that adequate, non-entangling follow-up procedures will be developed. See Findings of Fact" (App. to Jur. St. 18).

Despite the conjecture and hypothetical problems raised by Appellants, the court below was satisfied that the State's procedures, and the experience of the Appellee institutions with federal program requirements, afford protection that the aid will be used for secular purposes (App. to Jur. St. 48).

The fact that the Maryland aid is not categorized as to the type of educational purpose to which it must be put is not significant. Categorization of aid has only been required by this Court when the aid involved "pervasively sectarian" schools. See *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4600. (See discussion pp. 21-22, *supra*). Where the institution has a predominantly educational purpose, only the negative restriction is necessary to ensure that identifiable religious activities (e.g. chapel) do not receive funds.

Because religion does not permeate the secular educational programs of Appellee colleges, the established procedures of the Maryland administering body effectively prohibit the use of funds for sectarian purposes as required by the Maryland Act.



## III.

### THE MARYLAND PROGRAM DOES NOT FOSTER EXCESSIVE GOVERNMENTAL OR POLITICAL ENTANGLEMENT WITH RELIGION.

The court below found that the "relationship between church and state which results from this aid program is not entangling" (App. to Jur. St. 17). The court below considered the three mitigating factors noted by this Court in *Tilton:*

> "In evaluating administrative entanglement, the Court must examine three factors: The 'character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.' *Lemon v. Kurtzman, supra,* at 615" (App. to Jur. St. 14).

The court below concluded that 1) "The aid in this program is restricted to the secular aspects of the institutions." (App. to Jur. St. 19); 2) "It has been found that religious indoctrination is not a purpose of these institutions." (App. to Jur. St. 19); 3) "The continuing nature of the program is not constitutionally fatal" (App. to Jur. St. 20).

#### A. Maryland Aid To The Educational Functions Of St. Joseph College May Be Administered Without Government Entanglement Because Religion Does Not Pervade Those Educational Functions.

The factual basis for this Court's holding in *Lemon v. Kurtzman, supra,* that the Pennsylvania aid program fostered excessive entanglement between government and religion, was the finding that religion and indoctrination were interwoven through the fabric of the entire educational program:

"The curriculum presents subtle and difficult problems. The constitutional mandate can in part be carried out by censoring the curricula. What is palpably a sectarian course can be marked for deletion. But the problem only starts there. Sectarian instruction, in which, of course, a State may not indulge, can take place in a course on Shakespeare or in one on mathematics. No matter what the curriculum offers, the question is, what is *taught?* We deal not with evil teachers but with zealous ones who may use any opportunity to indoctrinate a class." *Lemon v. Kurtzman, supra,* 403 U.S. 602, 634-35 (concurring opinion of Mr. Justice Douglas).

"It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind." *Lemon v. Kurtzman, supra,* 403 U.S. 602, 635 (concurring opinion of Mr. Justice Douglas).

"In the present cases we deal with the totality of instruction destined to be sectarian, at least in part, if the religious character of the school is to be maintained. A school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction. Parochial schools, in large measure, do not accept the assumption that secular subjects should be unrelated to religious teaching." *Lemon v. Kurtzman, supra,* 403 U.S. 602, 636-37 (concurring opinion of Mr. Justice Douglas).

In *Lemon,* this Court found that policing the restrictions upon the aid would require an entangling relationship:

"I would think that policing these grants to detect sectarian instruction would be insufferable to religious partisans and would breed division and dissension between church and state." *Lemon v. Kurtzman, supra,* 403 U.S. 602, 636 (concurring opinion of Mr. Justice Douglas).



This Court in *Lemon* also found direct and absolute control of the church over the teachers: "This problem looms large where the church controls the hiring and firing of teachers." *Lemon v. Kurtzman, supra,* 403 U.S. 602, 636 (concurring opinion of Mr. Justice Douglas).

It is clear that the basic distinction between *Tilton* and *Lemon* is that the secular educational function of the colleges in *Tilton* was not so permeated by religious indoctrination that an entangling relationship resulted from enforcement of the restrictions:

"Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglement between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of the compulsory education laws." *Tilton v. Richardson, supra,* 403 U.S. 672, 687.

Again in *Hunt v. McNair, supra,* this Court stated that the entanglement of government and religion was caused by the inseparability of religion and the secular educational program:

"The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution." 413 U.S. 734, 746.

### B. The Maryland System Requiring Use Identification And Verification Is A Proven Means Of Restricting Governmental Grants To Designated Purposes Without Requiring Intensive Surveillance.

The two-step "before and after" verification procedure established is essentially the type of procedure used to ensure proper use of funds received under the Higher Education Facilities Act of 1963. (See the lower court decision in *Tilton,* i.e. *Tilton v. Finch,* 312 F. Supp. 1191, at 1202 (D. Conn. 1970), discussed at p. 38, *supra*).

Once the use made of the aid is identified by the college and approved by the administering body, an auditing procedure is available to verify that the funds are used for the purposes stated. The court below found that the technique of fund accounting to comply with grant restrictions is in use at the colleges to comply with federal grant programs[4] and that any audit required by the Maryland program would be "quick and non-judgmental" (App. to Jur. St. 48).

Appellants contend that a non-judgmental audit is of no effect. Obviously, the auditor "judges" whether the funds are spent for the purposes stated. The effective judgment is made, however, by the administering body in acting upon the use verification. Since religion does not permeate the secular education of the Appellee colleges, the judgments made do not require the sorting out of religious from secular functions which this Court has held to be entangling.

[4] Fund accounting under federal grants to colleges is presently required under numerous federal programs and St. Joseph College, as well as the others, are experienced in complying with such requirements (Tr. 312-14).



It is clear that this Court in *Tilton* permitted a "continuing relationship" between the government and colleges. The Court, in fact, required the inspection of the facility to continue beyond the twenty-year period prescribed by the statute. 403 U.S. 672, 689. This Court distinguished *Tilton* from *Lemon* because enforcement of the Higher Education Facilities Act did not require a continuous surveillance of the institution:

> "Finally, government entanglements with religion are reduced by the circumstance that, unlike the direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance, the Government aid here is one-time, single-purpose construction grant." *Tilton v. Richardson, supra,* 403 U.S. 672, 688.

A continuing relationship between the State of Maryland and Appellee colleges does not, in itself, foster excessive entanglement between government and religion. The entangling relationship found by this Court in *Lemon* was the continuing governmental surveillance necessary to detect and remove from parish school programs the methods of religious inculcation which permeated those sectarian institutions. In this case, the court below found that no such detection and removal is necessary, because the secular educational programs of the colleges are not permeated by religion, and that the state can ensure use of the aid for those secular programs without establishing an entangling relationship.

In *Meek v. Pittenger, supra,* this Court considered the "potential for political entanglement" and "successive opportunities for political fragmentation and division along religious lines, one of the principal evils against

which the Establishment Clause was intended to protect." 43 U.S.L.W. 4596, 4603.

The opinion of Mr. Justice Brennan, with whom Mr. Justice Douglas and Mr. Justice Marshall joined, concurring and dissenting, set forth their fears of "political entanglement":

> "In a community where . . . a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all the usual political techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith. [Citing *Lemon v. Kurtzman, supra,* 403 U.S. 602, 622-23]." 43 U.S.L.W. 4596, 4604.

It is clear that the fears expressed above are not applicable to this case. Of the remaining four Appellants, one college has closed, and thus Appellants constitute only three of seventeen institutions receiving aid under the Act (App. to Jur. St. 35-36). In addition, the Appellee colleges are not parish schools with partisans dedicated to both the religious and secular educational missions of their schools. The history of the Maryland Act shows that the primary issue was the need to assist private colleges and thus save money for the state.

The Maryland District Court of three Judges correctly held that the Maryland aid program does not foster excessive governmental entanglement with religion.



## IV.

**IF THE MARYLAND AID PROGRAM IS IN VIOLATION OF THE ESTABLISHMENT CLAUSE, ST. JOSEPH COLLEGE SHOULD NOT BE REQUIRED TO PAY BACK FUNDS ALREADY RECEIVED IN RELIANCE UPON THE CONSTITUTIONALITY OF THE MARYLAND ACT.**

Appellants' prayer that monies paid out be repaid to the State by the Appellee colleges arises only if the Act is held to violate the Constitution. The question then arises as to whether this Court's ruling should be applied retroactively. The court below held that the original Act (Chapter 626, Acts of 1971) violated the Establishment Clause, but held that the principles established by this Court in *Lemon v. Kurtzman,* 411 U.S. 192 (1973) *(Lemon II)* compelled a holding that the funds awarded and paid under the original Act not be repaid (App. to Jur. St. 23-23). The dissenting opinion concurred in the result (App. to Jur. St. 34). On this issue, Appellee adopts the reasoning and authority of the Maryland District Court of three judges in support of that holding.[5]

The issue of whether subsequent funds awarded and paid under the Act as amended must be repaid only arises if this Court reverses the holding of the Maryland District Court of three judges, that the Act, as amended, is constitutional. In such a case, the principles of *Lemon II* would require that such a holding not be applied retroactively.

It is submitted that the following language, quoted from *Lemon II,* is compelling in the instant case:

---

[5] Apparently Appellants do not contest this holding. Appellants' Brief submits that "all payments not enjoined upon timely filed motions or applications" should be repaid (Appellants' Brief, p. 76). However, the grants under the original Act were awarded and paid before this litigation was initiated (App. to Jur. St. 37, n. 2; App. 2).

> "Appellants ask, in effect, that we hold those charged with executing state legislative directives to the peril of having their arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional. Appellants would have state officials stay their hands until newly enacted state programs are 'ratified' by the federal courts, or risk draconian, retrospective decrees should the legislation fall. In our view, appellants' position could seriously undermine the initiative of state legislatures and executive officials alike." 411 U.S. 192, 207-08.

St. Joseph College has relied upon the official acts of the Maryland legislature, the Governor of Maryland, the Board of Public Works of Maryland, the Maryland Council of Higher Education, a United States District Court of three judges, and the United States Supreme Court, which refused to enjoin the payment of funds under the Act. If a private institution cannot rely upon the legislative and executive branches of a sovereign state, and rulings by a three-judge panel and the nation's highest Court, then where shall reliance ever be found? The conclusion of this Court in *Lemon II* is applicable to this case:

> "On this record the District Court could reasonably find reliance on the part of the appellee schools and reasonably could conclude that no more was needed to demonstrate retrospectively the degree of their reliance." 411 U.S. 192, 206.

This Court in *Lemon II* considered whether any ruling of unconstitutionality by this Court should have been so clearly foreshadowed that the State could be considered to have acted in bad faith in paying out funds to the colleges pending appeal. 411 U.S. 192, 206-07.



Clearly there is no reason for the State to have anticipated such a ruling, when it paid out funds. A United States District Court of three judges found the Maryland Act, as amended, to be constitutional under established decisions of this Court. The recipient colleges closely parallel the colleges in *Tilton*. This Court has not heretofore found excessive government entanglement with religion to exist in aid programs to church-related colleges whose educational programs are not pervaded by religion. The concept of political entanglement has been set forth by this Court only in general terms as a supportive ground for its decisions based on more established and specific constitutional tests. *Meek v. Pittenger, supra,* 43 U.S.L.W. 4596, 4602. A ruling by this Court that the Maryland program is unconstitutional requires a departure from the established line of decisions, or a novel approach to the issue.

In *Lemon II,* this Court considered whether the constitutional evils associated with the program would be furthered if repayment were not required. 411 U.S. 192, 201-03.

If this Court finds the Act unconstitutional because of administrative or political entanglement, the repayment of funds will not further the constitutional objectives of such a holding. Any entanglement with respect to the funds paid will not be "untangled" as a result of repayment. In fact, additional administrative and political entanglement may result from the State collecting the funds from these private institutions.

Appellants' claim that a failure to require repayment would deprive them of any effective remedy (Appellants' Brief, p. 79-80). On the contrary, Appellants have had access to every course of redress available to

taxpayers and citizens, including access of citizens to their elected representatives and the opportunity to present a convincing case, based on the evidence, to a federal District Court of three judges. That the Appellants have failed in these endeavors thus far, is a risk inherent in the processes of the judicial system, and should not be "remedied" by subjecting the Appellee colleges, which have relied upon the same judicial system, to a "draconian, retrospective decree."

It is submitted that Appellants' prayer to require repayment of the funds disbursed under the Maryland Act be denied.

## CONCLUSION

The court below correctly applied the constitutional principles and specific criteria established by this Court and determined that the Maryland aid program does not have the primary effect of advancing religion and does not foster excessive entanglement between government and religion. Although Appellants insist that the court below erred in its factual findings that the secular educational programs of Appellee institutions are not permeated by religion, and that the Maryland statute does, in fact, restrict the aid from use for sectarian purposes, such insistence by Appellants is not supported by the evidence documented in the record before this Court. The judgment of the Maryland District Court of three judges should be affirmed.

Respectfully submitted,

GEORGE T. TYLER,
ROBERT V. BARTON, JR.,
1600 Maryland Nat'l Bank Bldg.,
Baltimore, Maryland 21202,
Attorneys for Appellee,
Saint Joseph College.